Comments on Notice of Proposed
Rulemaking and Memorandum
Opinion and Order

CG Docket No. 02-278

Relating to Rules and Regulations
Implementing the Telephone Consumer
Protection Act of 1991

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I. INTRODUCTION

1. I reside in San Diego County, California. Towards the end of 2001 my personal frustration and aggravation with unsolicited telemarketing calls including "dead air" calls, artificial or prerecorded voice messages, and unsolicited facsimile advertisements caused me to seek a remedy. I began researching the available laws and keeping a log of telemarketing calls received. To date I have logged a couple of hundred unsolicited telemarketing calls, plus nearly one hundred "dead air" or "hang-up" calls, and have filed several enforcement lawsuits in California small claims courts.

2. In considering the economic impact of regulating telemarketing one needs clearly to distinguish between outbound telemarketing and inbound telemarketing. Inbound telemarketing is where a consumer places a telephone call to a business in response to some other form of marketing or advertising. This is not the type of telemarketing activity the Telephone Consumer Protection Act (TCPA) was intended to regulate because with inbound telemarketing there is no invasion of consumer privacy, since the consumer voluntarily places the call. Outbound telemarketing is where a business places a call to the consumer at his or her residence, and this is the type of telemarketing activity the TCPA was intended to regulate.

3. The Commission cites the Direct Marketing Association to estimate that 104 million outbound telemarketing calls are placed to businesses and consumers each day. (FCC 02-250, ¶ 7, Sept. 18, 2002.) This huge volume of calls is a substantial impact upon the privacy of consumers. The Commission further cites the Direct Marketing Association to estimate that telemarketing generates over $600 Billion in sales each year. (Ibid.) Unfortunately, this figure is misleading, since it includes both inbound and outbound telemarketing sales. There seem to be no public figures that show the economic impact of outbound telemarketing. One would think that if outbound telemarketing sales were a substantial portion of total telemarketing sales, that there would be separate sales figures published for outbound telemarketing. Whatever the amount of sales generated by outbound telemarketing, it exists because it is profitable for businesses.

4. The invasion of privacy the TCPA was intended to regulate is the consumer's receipt of unwanted telephone solicitations. The consumer's telephone rings, the consumer interrupts his or her activity to answer the

telephone, not to find the voice of a friend or family member, but to find a stranger salesperson, an artificial or prerecorded voice, or perhaps worst of all a "hang-up" or "dead-air" call. As soon as the phone rings a consumer's privacy is invaded. Then, the nature of the call is what determines whether or not the invasion is acceptable to the consumer.

II. COMMENTS ON EXISTING RULES

a. Company-Specific Do-Not-Call Lists

5. With the company-specific approach to a do-not-call-list the burden is on the consumer to make a request not to be called again by that particular company. Even a consumer who doesn't want any telemarketing calls is subject to multiple calls from every business in the country before any enforcement action pursuant to the TCPA is available. This is very little protection for the consumer, and is unreasonably burdensome, considering the large volume of outbound telemarketing calls per day.

6. When I first began to log telemarketing calls received and requested to be put on a company's do-not-call list I found that frequently I was hung up on as soon as I asked to be put on the do-not-call list. I then modified my approach to first ask for contact information for the telemarketer such as their name, a contact phone number and their mailing address. I would ask them if they had my mailing address. I would give them my address and only then tell them that I wanted to be put on their do-not-call list and that I wanted to receive a written copy of their do-not-call policy.

7. Approximately 30 percent of the companies I asked to put my phone number on their do-not-call-list called one more time, which is only one call in violation of the TCPA and therefore there is no enforcement action available. I found approximately 10 percent of companies called two or more times after I asked to be put on their do-not-call list.

b. Network Technologies

8. I observed that approximately 90 percent of telemarketing calls fail to use "caller ID" to identify the caller. This occurs despite rules that prohibit blocking of the "caller ID" signal.

c. Autodialers, Predictive Dialers, and Answering Machine Detection

9. The method of dialing a particular telephone number, whether by automatic equipment, or by manually entering each digit does not directly influence the effect of the call on its recipient. It is the time at which the call is made and the contents of the call that determine its intrusiveness into the privacy of consumers. A "dead air" or "hang-up" call is just as intrusive into the privacy of a consumer whether the call was dialed by a live person one digit at a time, by a live person using a stored number in a telephone, by a computerized automatic dialing device for the purpose of detecting a fax number or detecting a telephone answering machine, or by a predictive dialer. The end effect on the consumer is the same. The concern of the Commission should be on the purpose to which automatic dialing equipment is used.

10. The definition of "autodialer" should include any method of dialing a telephone number other than manually pressing the button for each digit of the telephone number.

Predictive Dialers

11. The use of predictive dialers should be prohibited. Predictive dialers embody the disregard which outbound telemarketers have for the privacy of telephone consumers. Predictive dialers dial several phone numbers at once, and then intentionally hang up on many of the calls. There can be no legitimate interest in making a telephone call only to disconnect it without having a live operator speak to the consumer. The telemarketers value the time of their salespersons and use predictive dialers to ensure, that as much as possible, a salesperson is talking to a consumer and not dialing the telephone or waiting for a consumer to answer the phone. Telemarketers place no value on the consumer's time. When the telephone rings the consumer must stop their activities, go to the phone and answer it, often to hear only silence, or sometimes an artificial or prerecorded voice say, "I'm sorry, I must have dialed the wrong number," and then be disconnected. By using predictive dialers telemarketers have shifted a substantial portion of their costs onto consumers without permission. This practice should be prohibited. Predictive dialers are as intrusive as a sound truck driving

through a residential neighborhood broadcasting advertisements, and should be prohibited.

12. In the event the Commission does not completely prohibit the use of predictive dialers, then the Commission should strictly regulate their use.

13. Predictive dialers should only be used during "normal" working hours of 9:00 am to 5:00 pm. This will lessen the fear many people may have of receiving "dead air" or "hang-up" calls at night.

14. The predictive dialer abandonment rate should be very close to zero, since any "hang-up" or "dead air" calls unreasonably disturb consumers.

15. Before a predictive dialer disconnects a call it should identify the caller by use of an artificial or prerecorded voice. The identification should be said slowly and clearly, should be repeated at least once, and should contain the name of the company making the call, the name of the company on whose behalf the call is being made if made by a telemarketing service company, a toll-free telephone number for the company making the call and the company on whose behalf the call is being made, and this toll-free number must be a number where a live operator can be reached who can place the consumer on the company's do not call list. Additionally the identification should include the address of the company headquarters.

Answering Machine Detection

16. Telemarketing using answering machine detection, seeks to connect a live consumer to a live salesperson, or to play an artificial or prerecorded message into an answering machine. Any such message must properly identify the caller at the beginning of the message. The identification should be said slowly and clearly, should be repeated at least once, and should contain the name of the company making the call, the name of the company on whose behalf the call is being made if made by a telemarketing service company, a toll-free telephone number for the company making the call and the company on whose behalf the call is being made, and this toll-free number must be a number where a live operator can be reached who can place the consumer on the company's do not call list.

Additionally the identification should include the address of the company headquarters.

d. Identification Requirements

17. The vast majority of artificial or prerecorded messages that I have received do not identify the caller beyond a brand name or company name. Frequently these messages will prompt the consumer to press one key to hear more of the message and another key to be put on the company's do-not-call list, but there is no contact information given. One must listen to the entire message in order to attempt to learn the caller's identity. Often, even after listening to the entire message there is no contact information given. The only option one has is to leave a message giving a call back name and number and receive another call. Then after receiving the call back one can ask for contact information and ask to be placed on the company's do-not-call list. This is an unreasonable burden on the consumer.

18. Any artificial or prerecorded message must properly identify the caller at the beginning of the message. The identification should be said slowly and clearly, should be repeated at least once, and should contain the name of the company making the call, the name of the company on whose behalf the call is being made if made by a telemarketing service company, a toll-free telephone number for the company making the call and the company on whose behalf the call is being made, and this toll-free number must be a number where a live operator can be reached who can place the consumer on the company's do not call list. Additionally the identification should include the address of the company headquarters.

e. Artificial or Prerecorded Voice Messages

Commercial and Non-Commercial Calls

19. Artificial or prerecorded voice messages that offer "free" information or "free" estimates are a pretext to get around FCC rules. The purpose of these call is to generate future business. The FCC rules should prohibit all artificial or prerecorded messages, and not attempt to differentiate between "commercial" and "non-commercial" calls. The effect on the consumer is the same; a non-human voice is invading the privacy of the consumer's home.

20. If the FCC continues to differentiate between "commercial" and "non-commercial" artificial or pre-recorded calls, then the FCC should specifically prohibit calls that purport to give "free information," or "free estimates." The purpose of these calls is commercial. They are attempting to qualify prospects for future direct sales attempts, and to generate future sales. They are an attempt to get around the rules prohibiting commercial artificial or pre-recorded calls.

21. Artificial or pre-recorded messages that encourage the recipient to listen to a radio station or watch a television station are commercial in nature, since they seek to increase the number of viewers or listeners to sell to their commercial advertisers. Thus, they are attempting to increase the revenues of the callers. The FCC rules should specifically address these types of calls, specify them as commercial, and prohibit them.

Tax-exempt Nonprofit Organizations

22. The FCC should look at the ultimate purpose of artificial or pre-recorded calls. If the purpose is to sell a product or service or to advertise the quality or availability of a product or service, then the nature of the call is commercial and should be prohibited. When the sales techniques used by non-profit organizations is the same as the techniques used by commercial organizations, then the effect on the consumer is the same.

23. Non-profit organizations may "partner" with commercial enterprises in order to get around the FCC prohibition. I have received artificial or prerecorded voice calls from so called non-profit credit counseling companies, where the calls are made by a telemarketing company in the exact manner as any other artificial or pre-recorded call. The telemarketing company is making revenues for each person they deliver to the non-profit credit counseling company, and the non-profit credit counseling company is ultimately getting its revenues from creditor companies. Thus, the effect on the consumer is the same whether the call is made by a non-profit or a for-profit organization.

Established Business Relationship

24. The FCC should establish rules that define an established business relationship to be a current business relationship were the consumer

has voluntarily made a purchase or negotiated regarding a purchase from the business within a specified period of time not to exceed a year. A mere inquiry to a business should not subject the consumer to unwanted telephone solicitation.

25. The established business relationship exemption can act to circumnavigate the FCC rules unless the FCC specifies that a consumer may, by request, stop telemarketing solicitations from a company without having to sever the business relationship. A utility business is going to have an ongoing business relationship with its consumers, and the consumer should not have to choose between doing without an essential utility and not receiving unwanted telemarketing solicitations. The FCC rules must not permit telemarketers to "partner" with companies who have established business relationships.

26. The rules relating to the established business relationship should limit the types of products, services, or notices that the business can send to its existing customers to the same product or services that is the focus of the business relationship. Otherwise companies may exploit their business relationship to attempt to sell unrelated products or services, which would be intrusive into the privacy of the consumer.

f. Time of Day Restrictions

27. The FCC should restrict calling hours to "normal" working hours of 9:00 am to 5:00 p.m. local time, because calls at night are more intrusive into the privacy of consumers. This is a reasonable restriction on telemarketing, because calls can also be made on the weekends when people will be more available during the day. This restriction would still permit telemarketers 56 hours out of the total 168 hours per week in which to make telephone solicitations. This would be a third of all hours during the week and is sufficient time for telemarketers to conduct their business. Such additional restrictions should be made regardless of whether a national do-not-call registry is implemented.

g. Unsolicited Facsimile Advertisements

Prior Express Invitation or Permission

28. The exemption from the prohibition against sending unsolicited advertisements to facsimile machines where the person has given an express invitation or permission to receive such an otherwise prohibited facsimile should be strictly construed. The mere publication of a facsimile number on a business card or in a trade directory or on an application should not be construed as permission to send unsolicited facsimile advertisements. Nor should the company sending the facsimiles be able to escape liability because they merely claim someone gave them permission. The burden of proof should be on the sender to show express permission, which should be written permission signed by the recipient.

Established Business Relationship

29. The existence of a prior business relationship between a fax sender and recipient should not be interpreted to be consent of the recipient to receive unsolicited fax advertisements. This can lead to the absurd result where the mere existence of a facsimile machine may constitute permission for a business to send an unsolicited facsimile advertisement. The existing business relationship with a telephone company that supplies the telephone line used by the recipient's facsimile machine could be construed to create permission for the telephone company to send unsolicited facsimile advertisements. The telephone company could then "partner" with any number of additional businesses to send an unlimited number of unsolicited advertisements. The FCC should focus on the harm that the regulation was designed to prevent, which is the shifting of the costs of advertising onto the consumer by using their telephone line, their facsimile machine and supplies.

30. The FCC should adopt rules that require even in an existing business relationship that the sender of a facsimile advertisement obtain express permission of the recipient before sending the fax. Just because a person does business with a company does not mean that they wish to receive unsolicited facsimile advertisements. The consumer should not be placed in a position of having to choose between severing the business relationship, even with an essential utility business, and receiving an

unwanted and unsolicited facsimile advertisements that waste the consumer's facsimile machine time and supplies.

h. Wireless Telephone Numbers

31. The FCC should adopt rules that characterize wireless telephones as "residential telephone subscribers." Phone calls to these phone are at least as intrusive into the privacy of consumers as calls to residences, since the consumer may actually carry a wireless phone on his or her person, or in his or her automobile.

32. The FCC should adopt rules prohibiting telemarketing calls to all wireless telephones. There are a wide variety of wireless calling plans and many consumers are charged for each call made or received and for the time of the call. Consumers may have limited storage for messages, or may be charged for messages. Many consumers have wireless telephones for emergencies while traveling, and such a telephone is not an appropriate medium to be the recipient of unsolicited sales calls.

i. Enforcement

Private Right of Action and Individual Complaints

33. The FCC should adopt rules permitting a consumer to bring suit for one call in violation of the TCPA rules for such violations as failure to properly identify the telemarketer or for making calls outside of the permitted call times. There is no reason a telemarketer cannot comply with these rules on every call. Also making a private enforcement suit available on the first call in violation of the rules would relieve the consumer of the burden of keeping a log of all calls made by telemarketers.

34. For violations of the do-not-call list rule a consumer who wishes to not be called by a telemarketer has to receive three calls before he or she can bring suit. The first call does not violate the do-not-call provision, but is the call where the consumer requests to be put on the company's do-not-call list. The second call made is in violation of the do-not-call request, but since it is only the first call in violation of the do-not-call rule, the consumer is not entitled to bring suit. It is only after the telemarketer calls a third time within a year of the first call that the consumer can finally bring

suit. This is an excessive intrusion into the consumer's privacy without the consumer having any remedy.

35. When a consumer requests to be placed on a company's do-not-call list, the FCC rules should recognize that it may take a while for the company to comply with the request. The company is required to immediately make a notation of the request, but the number may have to be filtered against numbers in databases and automatic dialing equipment, and this may take some time. The rules should specify a reasonable period of time such as seven days in order for the telemarketer to update all of the records necessary to implement the do-not-call list. This period of time should be a "safe harbor" for the telemarketer who makes a second call to the consumer within this time period. A second call during this "safe harbor" period should not be considered a violation as long as the telemarketer has previously established written procedures for implementing a do-not-call list. Making a rule with a specific time period would help courts determine whether or not a company has complied with the do-not-call list rules.

36. Requiring the consumer to wait until he or she has received more than one call in violation of the rules within a 12-month period requires the consumer to keep a log of telemarketing calls received in order to have a legal remedy. This record keeping requirement is too burdensome on the consumer. Adopting a rule that allows a suit after one call in violation of the rules will better protect the consumer.

37. The FCC should adopt rules specifying an amount of time, such as 30 days, by which a telemarketer must provide a copy of its do-not-call policy to a consumer who has requested the policy. The FCC should adopt rules requiring each policy to be dated and to be signed by its author or person responsible for its implementation. This rule would assist courts in knowing when a telemarketer has not complied with the rules, and would therefore provide better guidance to telemarketers.

State Law Preemption

38. Small claims court is the only cost-effective way for consumers to bring suit to enforce the rules of the TCPA. In small claims court a plaintiff does not need a lawyer. The TCPA does not provide for an award of attorney's fees, and the cost of hiring a lawyer would vastly exceed the

possible award of damages. Unfortunately by bringing a small claims suit the plaintiff (at least in California) gives up the right to appeal the case, but the defendant can always appeal. From my experience there is a lot of confusion in the small claims court about how to interpret the TCPA, and since these are not published opinions, the interpretations vary greatly from court to court.

39. In footnote 174 of FCC 02-250, an unpublished superior court case, *Kaufman v. ASC Systems, Inc*. (No. BC222588, Los Angeles Superior Court, Dec. 12, 2001) was cited as an example of a ruling that a state law preempts the TCPA, and thus a consumer has no private right of action pursuant to the TCPA. This case held that California Business and Professions Code section 17538.4, which only prohibits unsolicited facsimile advertisements that do not contain the identity of the sender and a toll-free number to call to be put on a do-not-fax list, preempted the TCPA and therefore there was no private right of action in California pursuant to the TCPA against unsolicited fax advertisements. This is an up published case and therefore cannot be cited as general precedent in a California court (California Rules of Court Section 977.) Despite this, it has been provided by fax broadcasters to their customers who are sued pursuant to the TCPA, and has been misused by small claims judges to dismiss claims.

40. The California legislature has taken notice of the confusion in some courts and recently amended Business and Professions Code Section 17538.4 to delete all references to unsolicited facsimiles advertising, with the intent of leaving the federal TCPA as the sole enforcement mechanism. (California Assembly Bill 2944, enacted September 19, 2002, effective January 1, 2003.)

41. A similar preemption problem may exist for artificial or prerecorded voice calls, since California Civil Code Section 1770 (a) (22) (A), prohibits, as an unfair business practice, disseminating an unsolicited prerecorded message without an unrecorded, natural voice first informing the person of the call and obtaining consent to play the message. The enforcement scheme of this code section requires 30-day written notice to the business to "correct" the violation before a suit can be brought. This is not as simple or powerful a remedy as the private right of action pursuant to the TCPA, since only actual damages can be recovered.

42. The FCC should adopt rules clarifying that the enforcement provisions of the TCPA are in addition to any state laws, and that the state laws do not preempt the TCPA. If the FCC cannot adopt such rules, then the FCC should request that Congress enact clarifying legislation.

III PROPOSED NATIONAL DO-NOT-CALL LIST

43. The FCC should implement a national do-not-call list. There are two ways to develop the list of persons who do not wish to receive telephone solicitations. The most obvious way is to develop a list by collecting the names and telephone numbers of people who do not wish to receive telephone solicitations. This would be an opt-out do-not-call list. However, considering the costs of administering such a potentially large database, the better method would be to implement an opt-in list of consumers who desire to receive unsolicited telemarketing calls. This list would be much smaller, easier and cheaper to administrate than an opt-out do-not-call list. If telemarketer's "speech" has significant value in the marketplace of ideas, and if consumers benefit from the commercial offers made to them by telemarketers, then consumers would flock to an opt-in list. The burden of an opt-in-may-call list would be less burdensome on telemarketers, since they would not have to compare a do-not-call list to their existing databases and edit their existing databases. Instead they would only have to obtain the opt-in-may-call list and use that as their telemarketing list.

44. Having an opt-in-may-call list would allow for more up-to-date information, since the list could be purged every year, and then consumers would have to add themselves back to the list if they still wanted to receive unsolicited telephone calls. This would reduce the problem stated by some telemarketers that the current 10 year maintenance of the company specific do-not-call lists causes these list to be inaccurate and include too many numbers because nearly one-fifth of all residential telephone number change ownership each year

45. Implementing an opt-in-may-call list could also be used for unsolicited facsimile advertisements, and inclusion on the list would be a clearly expressed invitation to receive facsimile advertisements. This would make enforcement easier.

46. A national list would be easier for telemarketers to comply with than with many different state lists and requirements. This would reduce the burden on telemarketers.

47. A national list would assist telemarketers to not call wireless telephones of persons who did not want such calls. This will be especially useful as telephone number portability is implemented, and telemarketers will no longer be able to distinguish a wireless phone from its special area code or exchange.

48. A national do-not-call list places the burden on the caller instead of the consumer. This is a much more efficient way to collect the information, since individual consumers only have to ask to be placed on one list, and the calling companies don't have to deal with processing individual consumer requests.

IV CONCLUSION

49. In the ten years since the FCC rules were first implemented, the volume of telemarketing has increased because technical advancements have made it easier for telemarketers to call more people, and telemarketers have developed ways to circumvent many of the FCC rules. Court enforcement of the TCPA has been hampered by rules subject to multiple interpretations, especially involving state preemption. The FCC should act to set specific limits in the rules, increase and facilitate private enforcement, and should implement a national do-not-call list by use of an opt-in-may-call list.